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No. 88-1988

In The

Supreme Court of the United States

October Term 1989

MORTON M. LAPIDES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Robert H. Morse, Esquire
David K. Monroe, Esquire
Peter J. Petesch, Esquire
Michael T. Dean, Esquire
GALLAND, KHARASCH,
MORSE & GARFINKLE, P.C.
1054 Thirty-First Street, NW
Washington, DC 20007
(202) 342-5200
Of Counsel

Alan Dershowitz, Esquire
and
Elizabeth A. Boggs, Esquire
Of Counsel
232 Brattle Street
Cambridge, MA 02138
(617) 495-3100

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INTRODUCTION

Petitioner hereby submits this reply brief to address matters raised in the government's Brief in Opposition.

ARGUMENT

I. PETITIONER DID NOT RECEIVE THE INDEPENDENT APPELLATE REVIEW EVEN THE GOVERNMENT CONCEDES HE WAS DUE.

In its opposition brief, the government contends that the unpublished *per curiam* opinion below satisfies Petitioner's right to an independent review of his conviction by the Court of Appeals. (Govt. Brief at 4.) Even a cursory review of the record makes clear, however, that the Court of Appeals did not conduct an independent review of Petitioner's conviction.[1] Indeed, the

[1] The Court of Appeals apparently relied on a conclusory, inaccurate description of the evidence in the trial court's opinion.

linchpin of the Court of Appeals decision was its erroneous belief that the testimony of Jerry Pollino supported, rather than flatly contradicted, the testimony of the only witness against Petitioner — James Sheridan. Mistakenly convinced that the case against Petitioner was overwhelming, the Court of Appeals apparently believed it unnecessary to give serious consideration to the issues raised by Petitioner.

The government's brief attempts to buttress the Court of Appeals opinion by twisting the testimony of Pollino to fit the Court of Appeals' erroneous recitation of the evidence. The government's rendition of Pollino's testimony is simply not supported by the record.

(1) The government contends that Sheridan and Pollino "both implicated Petitioner in the price fixing conspiracy." (Govt. Brief at 6.) The government supplies no citation for this assertion and none exists in the record.

(2) The government asserts that "Sheridan and Pollino, who were subordinates of Petitioner, testified that Petitioner knew in 1982 that Pollino was going to meet with Coke's president, James Harford, at an upcoming Ocean City convention to discuss pricing." (Govt. Brief at 6.) This bald assertion is contradicted by the record. Pollino merely testified that Petitioner had been informed that Pollino would be seeing Harford at a Maryland Soft Drink Association convention — hardly a surprising or suspicious occurrence at a convention whose purpose was to bring together members of the industry to discuss legitimate concerns. On direct examination by the government, Pollino specifically denied that the possibility of discussing prices with Harford was mentioned to Petitioner. (C. A. App. at 2528[2].) Indeed, Pollino did not even testify that Petitioner assented to the meeting with Harford. (C. A. App. at 2532.)

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[2] Q. Did you discuss what the reasons were for the meeting in Ocean City at the convention?

A. No. The whole meeting probably took a minute, a minute and a half max. It was very quick. Very brief. And back out and have lunch.

(3) The government also asserts that "Pollino as well as Sheridan testified that Petitioner knowingly endorsed it [the conspiracy]." (Govt. Brief at 7, n.7.) Again, the record is clearly to the contrary; the very page cited by the government refutes its assertion. (C. A. App. at 2532[3].)

(4) The government further contends that "Pollino did not contradict Sheridan's testimony" regarding reports to Petitioner about the conspiracy. However, Sheridan claimed these alleged reports were made pursuant to a directive given by Petitioner at the critical 1982 meeting attended by Sheridan, Pollino and petitioner. Pollino flatly denies such a directive was given. *See* Cert. Pet. at 12, n. 6.

The Court of Appeals' failure to independently review the fundamental facts underlying Petitioner's appeal deprived Petitioner of his right to a meaningful appeal. Nonetheless, the government argues that this Court should not consider issues relating to the sufficiency of the evidence on a petition for certiorari. (Govt. Brief at 6.) The government's argument is disingenuous, particularly in light of its earlier suggestion that a petition for certiorari to this Court is the appropriate mechanism to ensure the Courts of Appeals' accountability in cases disposed of by unpublished or summary opinions. (Govt. Brief at 5.)

This Court should grant certiorari in order to determine whether the Court of Appeals has provided a meaningful review of Petitioner's contentions and to consider the limitations of the right of appeal resulting from the increasing use of unpublished dispositions of appeals.

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[3] Q. Did Mr. Lapides [Petitioner] indicate his assent that you should meet with Mr. Harford?

A. No, sir.

II. THE COURT OF APPEALS FAILED TO ADDRESS THE PREJUDICE TO PETITIONER RESULTING FROM THE GOVERNMENT'S USE OF AN UNCHARGED THEORY OF VICARIOUS LIABILITY.

A. The Government Did Argue Its Vicarious Liability Theory To The Jury.

The government apparently now seeks to deny that it argued its vicarious liability theory. (Govt. Brief at 9.)[4] Once again, the record belies the government's position. The government argued:

> In addition, as Chairman of the Board, and the controlling owner of the company, he [Petitioner] joined the conspiracy and was responsible for it by encouraging his subordinate employees, by authorizing their conduct, by condoning what was going on, and *by failing to take any action to stop the price fixing when he clearly had the power to do so.*
>
> * * *
>
> ...Like Lapides [Petitioner], Harford joined in and was responsible for the conspiracy *by his failure to put a stop to the activities of his subordinates, that he knew the price fixing activities were going on.*

(Emphasis added.) [C. A. App. at 7556-7.]

There could have been no purpose for the government's emphasis on Petitioner's failure to stop the price fixing conspiracy except to assure the jury that Petitioner could be convicted on that basis. The fact that the vicarious liability theory was included in an otherwise proper argument does not lessen the prejudice to Petitioner nor immunize the improper argument from scrutiny. The jury was quite clearly urged by the government to convict

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[4] Although the government now seeks to characterize Pollino's testimony as favorable to its case, the government was clearly aware at trial of the weakness of its case resulting from the fundamental contradictions between Sheridan and Pollino. In order to bolster its case, the government sought to persuade the jury during argument that Petitioner could be convicted if he knew about the conspiracy and failed to put a stop to it. This theory of vicarious liability was not set forth in the indictment and is not a proper basis for conviction under the Sherman Act.

Petitioner if they believed he merely knew about the conspiracy and failed to stop it.[5]

B. The Trial Court's Instructions Did Not Cure The Prejudicial Effects Of The Government's Improper Argument.

The government also contends that, even if its argument to the jury was improper, its conduct could not supply a basis for reversal because the trial court properly instructed the jury that the court's charge, and not arguments of counsel, must govern deliberations. (Govt. Brief at 9-10.) However, the mere reading of this standard instruction, particularly without reference to the specific misstatements of law made by the government, does not immunize improper argument.

A reviewing court "may consider the prejudicial statements themselves, the efficacy of any cautionary instructions given by the district court, and the strength of the admissible evidence of guilt," in determining whether improper argument requires reversal. *United States v. Hutson*, 821 F.2d 1015, 1021 (5th Cir. 1987), *citing United States v. Livingston*, 816 F.2d 184, 195 (5th Cir. 1987). The government's misstatement of the acts required to support conviction was obviously prejudicial to Petitioner. Indeed, the government argued a theory of liability that required no acts of participation whatsoever.[6]

[5] In arguing its vicarious liability theory, the government clearly misstated applicable law. *See United States v. Panzanella*, 416 F.Supp. 68, 72 (W.D. Pa. 1976) (failure to prevent conspiracy despite power to do so does not prove guilt absent evidence of affirmative participation in the conspiracy). Moreover, the government's arguments were made despite the trial court's refusal to give the government's requested instruction on its vicarious liability theory. A prosecutor may not misstate the law in closing argument. *See United States v. Artus*, 591 F.2d 526, 528 (9th Cir. 1979) (conviction reversed); *United States v. Segna*, 555 F.2d 226, 231 (9th Cir. 1977) (new trial granted based on closing arguments); *United States v. Narciso*, 446 F.Supp. 252 (E.D. Mich. 1977) (new trial granted based in part on prosecutor's misstatement of law during closing).

[6] Given the prejudicial effect a misstatement of the law may have on the jury at a critical time in the trial, counsel should take great care to avoid misstating the law during closing argument and, if in doubt, seek a ruling on the point before going forward with the argument. *See United States v. Sawyer*, 443 F.2d 712, 714 n.11 (D.C. Cir. 1971). Here, the government was aware the trial court had refused to instruct the jury on this theory, but nonetheless presented it to the jury.

III. THE TRIAL COURT DID NOT ADVISE THE JURY THAT IT COULD DISREGARD THE COURT'S COMMENTS REGARDING SHERIDAN'S CREDIBILITY.

The prejudice and unfairness arising from the trial court's comments bolstering the credibility of Sheridan is discussed in Petitioner's Petition for Certiorari. (Cert. Pet. at 12-14.) However, in its Brief in Opposition, the government implies that the trial court cured any prejudice resulting from its remarks by advising the jury that its comments could be disregarded. The record is to the contrary. The trial court did not clearly distinguish its personal remarks regarding Sheridan from the remaining binding instructions during its charge. Moreover, the trial court did not advise the jury that it could disregard the court's remarks regarding the credibility of Sheridan.

Indeed, the cautionary language cited in the government's brief did not relate to the trial court's comments regarding Sheridan's credibility, but instead introduced the trial court's comments regarding the difficulty the government faced in finding witnesses in a conspiracy case:

> You should receive the testimony of an alleged co-conspirator, or an immunized witness, with great caution and weigh it carefully. The fact that a witness may have participated in the crime charged in the indictment or that he may have violated the law or pled guilty does not mean that he has not told the truth, but it is a factor to utilize in considering and weighing the testimony of that person.
>
> I emphasize that certain witnesses were not on trial here. Mr. Sheridan was not on trial in this case.
>
> In relation to witnesses — and this is my comment — and I emphasize it's my comment, on the factor of witnesses, and it is only a comment. You may disregard this comment entirely.
>
> The government must take the witnesses where they find them.

> Obviously, the witnesses who know the most about any alleged price fixing are those who were employed and were hired by one or the other of the competing competitors.
>
> Insofar as the — they may testify — these witnesses of necessity must be employees of either one of these two companies.
>
> So the government must take them where they find them. If no one, if no one were to come forward, there is very little opportunity for the government to find out what did or did not happen. Obviously, therefore, either someone must come forward or the government must utilize some means of requiring the people to testify.
>
> I emphasize this as my comment because otherwise sometimes one doesn't understand about the necessity of this immunity situation.

(C. A. App. at 7936-7.)

Review of the pertinent portion of the trial court's instructions makes clear that the trial court's remarks regarding Sheridan's credibility were never identified as anything other than an instruction binding on the jury. The excerpts of the trial court's cautionary language cited in the government's brief related to the trial court's above-quoted comments regarding the government's need to use immunized witnesses.

IV. THE GOVERNMENT DOES NOT EXPLAIN WHY IT DELIBERATELY CHOSE TO WITHHOLD *BRADY* MATERIAL FROM PETITIONER UNTIL TRIAL.

The government readily admits that it learned of Sheridan's change in testimony regarding the crucial Ocean City meeting well before trial, but failed to disclose that information to Petitioner until the trial was underway. The government does not explain, however, why it failed to disclose Sheridan's change in

testimony to Petitioner until trial. Instead, the government argues that Petitioner was not prejudiced.[7]

The government clearly sought and obtained tactical advantage by suppressing Sheridan's change in testimony until the trial. First, the government prevented Petitioner from undertaking the time-consuming investigation of the circumstances surrounding Sheridan's change in testimony. Second, the government's concealment of Sheridan's change in testimony misled Petitioner as to the testimony he would be required to defend against at trial, causing him to waste time and resources preparing for testimony the government knew would not arise.

The government clearly believed it would benefit from the concealment of Sheridan's change in testimony until trial. In fact, the government apparently felt the benefits of keeping Petitioner in the dark were worth the risk of ignoring its obligations under *Brady* and violating the trial court's order to produce materials required by *Giglio v. United States*, 405 U.S. 150 (1972), 21 days before trial. (C. A. App. at 8604.) Having obtained those benefits, it cannot now credibly argue to this Court that Petitioner has suffered no prejudice.

With respect to Pollino's change in testimony regarding the critical Ocean City meeting, the government apparently claims that Pollino lied on the stand when he testified that he had initially told the government that the Ocean City meeting occurred in 1983. *See* Govt. Brief at 13. Incredibly, the government implies that Pollino was somehow a witness friendly to the defense. Such a suggestion about one of the government's two principal witnesses — a witness who testified for the government under a grant of immunity — is ludicrous.[8] Since the government has continued to

[7] The government apparently does not contend that Sheridan's change in testimony did not come under its obligations pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). Moreover, the government's suppression of Sheridan's change in testimony was clearly not an oversight. Prior to trial, the government made two supplemental *Brady* disclosures on other matters, the last such disclosure coming after Sheridan purportedly changed his testimony.

[8] Indeed, government attorneys met with Pollino at least seven times to prepare Pollino for trial, including some sessions which lasted up to two days. (C. A. App. at 2807.) Only one defense attorney met with Pollino on one occasion for

jealously guard its interview notes regarding Pollino, Petitioner cannot know for sure whether the government was truly surprised. However, it is significant that the government has apparently never taken any action against Pollino for perjury.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that this Court grant a writ of certiorari.

Robert H. Morse, Esquire
David K. Monroe, Esquire
Peter J. Petesch, Esquire
Michael T. Dean, Esquire
GALLAND, KHARASCH,
MORSE & GARFINKLE, P.C.
1054 Thirty-First Street, NW
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and
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Of Counsel
232 Brattle Street
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(617) 495-3100

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approximately one hour, seven months before trial. (C. A. App. at 2806.) That occasion was the last time any defense counsel was permitted to see Pollino.